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In The
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-622

JOHNS-MANVILLE PRODUCTS CORPORATION,
Appellant

v.

COMMISSIONER OF REVENUE ADMINISTRATION,

Appellee

On Appeal from the Supreme Court
of the State of New Hampshire

MOTION TO DISMISS OR AFFIRM

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The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the decision of the Supreme Court of the State of New Hampshire on the grounds first, that the decision is not appealable under 28 U.S.C. §1257(2); second, that the decision rests upon an adequate non-federal basis; third, that such federal questions as are involved are so unsubstantial as not to warrant further review.

I.

THE STATUTE INVOLVED AND THE NATURE OF THE CASE

This is a purported appeal under 28 U.S.C. §1257(2) from a decision of the Supreme Court of New Hampshire dismissing an appeal from the New Hampshire Board of Taxation for failure to meet the statutory burden of proof on appeal. The appellant is subject to taxation under New Hampshire Revised Statutes Annotated Chapter 77-A as amended (hereinafter RSA 77-A), applicable portions of which are reproduced in Appendix D to appellant's Jurisdictional Statement. The appellant is a multi-state corporation and, as such, is entitled to apportion its gross business profits under RSA 77-A:3 by the widely recognized three-factor formula set out therein. Only that portion of gross business profits reasonably related to activities within New Hampshire, as measured and determined by the formula, is subject to taxation by New Hampshire. The formula is subject to modification by the Commissioner of Revenue upon petition of the taxpayer.

The appellant was taxed under RSA 77-A in 1971 upon gross business profits, before apportionment, of $22.6 million, which included $15.9 million in gain from the sale of timberland located in Mississippi. The appellant objected to the inclusion of the $15.9 million gain in gross business profits before apportionment, asserting that the gain bore no reasonable relation to its activities in New Hampshire.

The Board of Taxation, upon hearing, found upon all the evidence submitted that the gain was attributable to activities in New Hampshire, and sustained its inclusion by the appellee. The text of the Board's decision is set out in Appendix B to appellant's Jurisdictional Statement.

The New Hampshire Supreme Court, on appeal, affirmed the Board's conclusion, finding that the timberland was an asset of the appellant as a "unitary" business, and the gain therefrom properly included in the appellant's gross business profits before apportionment. The Court held that the appellant

had failed to meet the burden under RSA 541:13 of showing "by a clear preponderance of the evidence . . . [that the] order is unjust or unreasonable", and accordingly dismissed the appeal. No record of testimony before the Board of Taxation was prepared, although the appellant had the option of providing for one if it had so desired.

The Court's opinion is not yet reported; however, the text of the opinion is set out in Appendix A to the appellant's Jurisdictional Statement.

II

ARGUMENT

A. *An Appeal Does Not Lie Under 28 U.S.C. 5§1257(2)*

The appellant seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1257(2). That section provides review only where a state statute is challenged on its face, or as applied to the challenger, on the ground that it is repugnant to the constitution, treaties, or laws of the United States, and the state court decision holds the statute valid. The appellant herein concedes that the procedure under RSA 77-A:3 for "apportioning the unitary income of a multi-state corporation" is constitutionally valid. Jurisdictional Statement, at 7. Rather, the appellant casts its own case as a challenge to "the validity of a state statute which apportions the income of a multi-state corporation without first deducting specific items of corporate income *unrelated to unitary business activity* conducted in part in the taxing state". *Id.*, at 7 [emphasis added]. An examination of the decision below, however, plainly shows that this is not such a case, and that RSA 77-A is not such a statute.

This is not such a case because the income in question was, upon the evidence presented, found by the trier of fact to be

related to the appellant's unitary business activity. The appellant, then, comes to this Court with a question of law framed upon facts wholly at variance with the findings of fact below. Let us assume, *arguendo*, that RSA 77-A does, as appellant suggests, prohibit any exclusion of specific items of income prior to apportionment; nevertheless, the appellant is not entitled to an exclusion, not because the statute forbids it, but because the income in question is related to the unitary business activity. Thus, upon the facts in this case, the appellant has no standing to challenge RSA 77-A on the ground that it prohibits exclusion of income unrelated to unitary business activity.

Moreover, RSA 77-A is not such a statute as appellant suggests. The appellant's contention that RSA 77-A flatly prohibits exclusion of any items of income prior to apportionment assumes a point which clearly was not decided by the New Hampshire Supreme Court, there having been no occasion to do so.

Thus, it becomes clear that the appellant by its own admission is not claiming that RSA 77-A is unconstitutional on its face; and is not claiming that the statute is void as applied to the facts found in this case. Indeed, given the finding that the income in question was related to unitary business activity, the appellant's own arguments compel the conclusion that its taxation under RSA 77-A was constitutionally proper. Jurisdictional Statement, at 7. *Butler Bros.* v. *McColgan*, 315 U.S. 501 (1942). Rather, the appellant's case reduces to a claim that the appellant's constitutional right to due process prevents the application of RSA 77-A to it with respect to the income in question, and the decision below is but a denial of the assertion of that right as a bar to such application. Review of such decisions and claims may be had only by certiorari under 28 U.S.C. §1257(3). *Mergenthaler Linotype Co.* v. *Davis*, 251 U.S. 256 (1920); *Charleston Federal Savings & Loan Ass'n.* v. *Alderson*, 324 U.S. 182 (1945); *Jett Bros. Distilling Co.* v. *Carrollton*, 252 U. S. 1 (1920); *Wilson* v. *Cook*, 327 U.S. 474 (1946); *Rohr Aircraft Corp.* v. *San Diego County*, 362 U.S. 628 (1960).

This Court reached the same result in an analogous case involving a state statute providing for constructive service, where the claim was not that "the statute was invalid as

applied, but rather than the effect of the state court's exercise of jurisdiction in the circumstances" was a deprivation of constitutional rights. *Hanson* v. *Denckla*, 357 U.S. 235, 244 (1958). See also: *Ex Parte Bransford*, 310 U.S. 354, 361 (1940).

For the reasons above, this attempted appeal under 28 U.S.C. §1257(2) should be dismissed for want of jurisdiction.

B. *The Decision Below Rests Upon An Adequate Non-Federal Basis*

The decision of the New Hampshire Supreme Court by its own terms is grounded upon a non-federal basis sufficient by itself to support the dismissal of the appeal to that Court.

The New Hampshire Supreme Court noted that both parties before it were in agreement upon the law of the case, and parted ways only with respect to the finding that the income in question was related to the unitary business of the appellant. Since the finding to that effect was made by the original trier of fact, the Board of Taxation, and the appellant caused no record of testimony to be preserved upon which review of that finding could be based, the Supreme Court held that the appellant had failed to sustain its burden of showing that the trier of fact was arbitrary or capricious in finding as it did.

Moreover, it is fair to say that, since the parties before it were in agreement as to the applicable law, and disagreed only upon the finding that the timberland was an asset of the unitary business, the Court did not "decide" a federal question at all, but merely reviewed the Board's decision with respect to the contention that it had no basis in evidence.

That this Court will not review cases which turn upon non-federal grounds, or which turn upon questions of fact determined by state courts, is settled beyond question. *Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961); *Grayson* v. *Harris*, 267 U.S. 352 (1925); *Fry Roofing Co.* v. *Wood*, 344 U.S. 157 (1952), rehearing denied, 345 U.S. 913 (1953).

C. *The Question Raised Is So Unsubstantial As Not To Need Further Argument.*

As the arguments set out above and the text of the opinion below amply demonstrate, the outcome of this case has turned at all stages upon the question whether the timberland sold by the appellant was an asset of its unitary business, and not upon the question whether RSA 77-A is constitutional.

The cases advanced by the appellant in support of its position that the timberland was not an asset of the unitary business (Jurisdictional Statement, at 8) are uniformly inapposite. Each involves an instance of dividend income from a subsidiary, but wholly separate and distinct, corporation. The "investment" in the subsidiary was found to be sufficiently severable as not to be considered a part of the unitary business. But no separate entity is involved here, since the appellant itself held title to the land (at least as it appears from the record) and reported the gain from the sale on its own federal tax return. The involvement of the timberland with appellant's unitary business was, we submit, greater by an order of magnitude than that present in cases involving ownership of stock in subsidiary corporations. The finding in this case is entirely reasonable upon the evidence presented, and ought not to be disturbed on appeal.

The "federal question" involved in this case, then, is one which is well settled, *Butler Bros., supra*, and which is not really a contested issue between the parties. The record discloses no evidence which would cause the Board of Taxation's finding to be labeled arbitrary, so the decision of the New Hampshire Supreme Court is plainly correct, and no further argument of the case is necessary.

III
CONCLUSION

For the reasons set out above, the appellee respectfully urges the Court to grant the Motion to Dismiss or Affirm herewith submitted.

Respectfully submitted,

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